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Supreme Court of the United States

No. 73-1312

October Term, 1973

EDWARD BARR and EDWARD ABDULLA,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

Was there impermissible selective enforcement in the prosecution of the criminal cases against petitioners?

Was a prima facie case made showing the existence of impermissible selective enforcement directed against the petitioners?

Were the petitioners entitled to an evidentiary hearing in relation to their allegation of impermissible selective enforcement directed against them?

STATUTE INVOLVED

Ohio Revised Code, Section 1707.23 (8624-28)—Enforcement powers of division of securities—reads as follows:

> "Whenever it appears to the division of securities, from its files, upon complaint, or otherwise, that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by sections 1707.01 to 1707.45, inclusive, of the Revised Code, or defined as fraudulent in such sections, or any other deceptive scheme or practice in connection with the sale of securities, or when the division believes it to be in the best interests of the public and necessary for the protection of investors, the division may:
>
> * * * * *
>
> (E) Initiate criminal proceedings under section 1707.44 of the Revised Code by laying before the prosecuting attorney of the proper county any evidence of criminality which shall come to its knowledge; and in the event of the neglect or refusal of the prosecuting attorney to prosecute such violations, the division shall submit such evidence to the attorney general, who may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before such grand juries."

STATEMENT OF THE CASE

In early 1972, a Summit County Grand Jury began an investigation into the complex financial dealings of D. Don Lowers. Before this penetrating investigation was finally completed, the Grand Jury carefully looked into all the relevant evidence that had been amassed concerning over sixty-five persons who were suspected of being key aides of Lowers in his scheme. As a result of this probe, on April 25, 1972, D. Don Lowers was indicted by a Summit County Grand Jury on twenty-six counts of Ohio Securities law violations. By June 15, 1972, ten more individuals who were also alleged to be engaged unlawfully in similar activities were indicted on charges of sale of securities without a license and sale of unregistered securities. On June 28, 1972, Edward Abdulla was charged with these same types of violations. He was indicted on four counts under Ohio Revised Code Section 1707.44(A) and four counts under Ohio Revised Code Section 1707.44(C). Two other individuals were similarly indicted on June 28, 1972, and a final indictment was handed down against one Paul Gradyan on July 11, 1972.

On September 19, 1972, Judge Stahl was appointed to hear these cases. Judge Stahl presided at the trial of John Steurer, who was convicted of securities violations on September 27, 1972. In the end of January, 1973, Judge Stahl, after hearing all of the related cases, was removed from hearing the final case against Edward Abdulla and Judge Sanders was appointed. On February 2, 1973, two motions were made before Judge Stahl. The first of these motions asked that the indictments of four of the Defendants (Steurer, Barr, Emery, and George) be dismissed on constitutional grounds.

On February 5, 1973, Edward Abdulla changed his plea to guilty. The motion attacking the constitutionality

of the indictments of the four defendants was argued before Judge Stahl on February 7, 1973. It was alleged that the Division of Securities had overbroad discretion that it tended to abuse.

Also, it was contended in the argument of the first motion that the Act was being unconstitutionally applied since only fourteen of the finders of new investors were indicted and since the fourteen were supposedly identical to the other fifty-one finders who were not indicted.

On February 8, 1973, nine other defendants, including Edward Abdulla, joined into the motions that had been argued the previous day, and Judge Stahl then overruled the motions.

The following day, February 9, 1973, in an atmosphere of controversy and conflicting allegations, Judge Sanders allowed Edward Abdulla to change his plea back to not guilty again. On March 12, 1973, the day the trial was to begin, eight motions were filed by Abdulla's attorneys, the first two attacking the indictments on constitutional grounds. The initial motion said that the Ohio Securities Act is unconstitutional since the Division of Securities is given arbitrary, capricious and unreasonable discretion. The second motion contended that there was an Equal Protection violation since only fourteen out of a supposedly possible sixty-five violators had been indicted. On March 14, 1973, Judge Sanders, in contrast to Judge Stahl, sustained the first two motions and dismissed or quashed the indictments.

On August 1, 1973, the Appellate Court held that the Security Law, Chapter 1707, and particularly Section 1707.23, Ohio Revised Code is not an arbitrary, capricious or unreasonable law. Furthermore, the Court held that the exercise of selectivity in the prosecution of this case, if it existed at all, was not "constitutionally impermissible".

On November 29, 1973, the order of the Supreme Court of Ohio, *sua sponte*, dismissing the appeal from the Court of Appeals in the case of *State of Ohio v. Abdulla*, was made and entered. The dismissal was made for the reason that no substantial constitutional question existed.

Similarly, on December 7, 1973, the order of the Supreme Court of Ohio, *sua sponte*, dismissing the appeal from the Court of Appeals, in the case of *State of Ohio v. Barr*, was made and entered. The dismissal was made for the reason that no substantial constitutional question existed.

RESPONDENT'S ANSWER TO THE PETITIONERS' REASONS FOR GRANTING THE WRIT OF CERTIORARI

Analysis of Petitioners' Questions

The Petitioners' present three questions for determination. The first question asks:

> May a reviewing court hold, as a matter of law, that the trier of fact was in error in finding that there had been an intentional and purposeful discriminatory application of a state penal statute, and rule, as a matter of law, that there had been no intentional and purposeful discriminatory application of such statute, thereby depriving the accused of the benefit of the finding of fact in his favor and foreclosing further evidentiary inquiry on the issue? (Petitioners' Brief, page 2).

Petitioners' first question ignores the key point that, in this area, the trial court must make certain legal determinations before it can permissibly make any findings of fact. In this case, the reviewing court discovered that the trial court had ignored the established constitutional guidelines and that the defendants (Petitioners) as a mat-

ter of law, were not entitled to have any findings of fact made. So the reviewing court was only ruling on appropriate questions of law, before it even got to any possible finding of fact.

Petitioners' second question asks:

> Is it constitutionally permissible, under the Fourteenth Amendment, for a state to place the burden on an accused to show beyond any doubt and to the satisfaction of a reviewing court that there has been a purposeful and discriminatory application of a state penal statute before he is entitled to a dismissal of the indictment against him on such ground? (Petitioners' Brief, page 2)

This question is rather misleading in that the State has never required the Petitioners to show unconstitutional selective enforcement beyond any doubt. This standard appears to be a rather colorful creation of Petitioners' imagination.

Petitioners' final question inquires:

> When an accused shows that the Prosecutor has specific evidence that the number of persons who committed the same crimes arising from the same scheme is many times greater than the number indicted, and the Prosecutor and a law enforcement officer admit that there has been no rational basis for selection, has the accused met his burden of making prima facie showing of intentional and purposeful discrimination sufficient to require the Prosecutor to rebut the evidence adduced? (Petitioners' Brief, page 2)

This question also assumes facts that are simply not true. There is no one who did all the things that the Petitioners did and who was not indicted. Further, neither the Prosecutor nor a law enforcement official ever said anything at all about there being no rational basis for selection. For the reasons already mentioned and from the

discussion of the case to follow, it can be seen that Petitioners' questions are internally inconsistent, are based on misinformation and are unsubstantiated in argument.

However, despite the muddled state of Petitioners' argument and questions, we can perceive the issues that they are apparently trying to raise.

The issues simply stated are:

Were the Petitioners the victims of unconstitutional selective enforcement?

Did the Petitioners establish a prima facie case showing this unconstitutional selective enforcement?

Were the Petitioners entitled to an evidentiary hearing to investigate the alleged unconstitutional selective enforcement?

An examination of the important cases in this area of the law will indicate that the answer to all three questions is clearly no.

RESPONDENT'S ARGUMENT ON THE MERITS

This Court has already on two important occasions delineated the scope of the selective enforcement defense.

In *Snowden v. Hughes*, 321 U.S. 1, 8, 10 (1944), the Court declared that there couldn't be a denial of equal protection unless it was alleged in the complaint and proven that there had been an element of intentional or purposeful discrimination. The Court added that the requirement cannot be met by merely characterizing the administration of the law as unequal, unjust, oppressive, or the like. Then in *Oyler v. Boles*, 368 U.S. 448, 456 (1962), the Court building on the foundation of *Snowden* said that there must be an intentional and purposeful discrimination and, "Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional viola-

tion. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged."

Petitioners next move on to the recent case of *United States v. Falk*, 479 F.2d 616 (7th Cir., En Banc, 1973), and argue that it too is, or at least should be, controlling in this area. Apparently, Petitioners agree with the majority in *Falk* who seem to hold that if a defendant makes out a prima facie case (as the court in *Falk* defines a prima facie case) of impermissible selective enforcement, then the defendant is entitled to an evidentiary hearing, wherein the government will have the burden of going forward with proof of nondiscrimination.

Then in order to bolster this line of argument we are cited to *Whitus v. Georgia*, 385 U.S. 545 (1967), which Petitioners seemingly feel is somehow supportive of the *Falk* concept of the prima facie case.

Before examining any of the above mentioned cases in greater detail it is necessary to briefly outline the interactions as they occurred between the various governmental agencies during the prosecution of the instant matter. This short digression is necessitated by the mass of inaccurate speculation and fabrication in Petitioners' argument.

This case was initiated when, the Division of Securities, acting under Section 1707.23(E) of the Ohio Revised Code, referred the whole D. Don Lowers affair to the Summit County Prosecutor. Neither the Administrator nor the Division picked out fourteen people or any people. When the County Prosecutor received the referral from the Division, he in turn did not pick out fourteen people or any people. All the Prosecutor did was present the

situation to the Grand Jury as he is required to do by law.

The Grand Jury at this time was confronted with a veritable mountain of facts, documents, testimony, and other evidence.

Also, the Grand Jury as part of its thorough investigation heard from approximately three hundred and fifty (350) witnesses. The Grand Jury had section 1707.44, among other sections, carefully explained to them and they understood it. They comprehended the essential elements of the relevant crimes and were in no way misled.

They heard the evidence against everyone of the sixty-five (65) people that the Petitioners are now pointing to. Not only did the Grand Jury hear the evidence against all sixty-five (65), but it also requested and received evidence concerning other individuals whose names came up in the course of the investigation. Only after sifting through this mass of testimony and other evidence did the Grand Jury hand down indictments against fourteen people for violations of Ohio Revised Code Section 1707.44; only then did the Grand Jury, and the Grand Jury alone, decide that fourteen people had violated the law. If one wished to call this selectivity, it is exactly the same selectivity, that the Grand Jury exercises every day when it decides whom to indict for armed robbery, rape, or homicide.

Furthermore, most importantly, the fourteen (14) who were indicted were all marked by two characteristics, unlike the remaining fifty-one. They were involved in the investment scheme for profit and they were implicated in numerous transactions. (See Appendix I.)

Of course no one but the members of the grand jury themselves knows exactly why they decided to indict these fourteen—just as no one knows why a petit jury decides to convict or acquit. But it appears that they did consider such things as the number of transactions, the profit seek-

ing motive, the circumstances of the sales, and the intent that these factors reflected.

In summary, these fourteen defendants comprised a distinct and conspicuous class of wrongdoers and whatever their rationale the Grand Jury was operating in the best legal tradition when it indicted the most blameworthy.

Bearing this brief outline in mind, we can return to the analysis of those cases that the Petitioners contend support their position. First, Petitioners have failed to show any intentional or purposeful discrimination, as required by *Snowden v. Hughes,* 321 U.S. 1 (1944).

Even more telling against them is their failure to meet the test set out in *Oyler v. Boles,* 368 U.S. 448 (1962). In the present case, there hasn't been the slightest hint that there was selectivity based upon an unjustifiable standard such as race, religion, or anti-Vietnam War activity as in *United States v. Falk,* 479 F.2d 616 (7th Cir. En Banc, 1973).

Petitioners rely heavily on *Falk* so an extensive examination of the case appears to be in order. It can be pointed out initially that there was a narrow four to three majority in *Falk.* Also the holding of the majority in *Falk* has not been adopted by this Court and Respondents urge that it should not be adopted for the reasons that are ably spelled out in the dissent in the case.

But assuming for the sake of argument that the decision was correct, let's see exactly what *Falk* dealt with.

Jeffrey Falk was convicted of refusing to submit to induction in the Armed Forces and with failure to possess a registration card or his 1968 and 1969 classification cards. The District Court granted a post-trial motion for acquittal, on count one, relating to refusing to submit to induction, on the ground that there had been no basis in fact for denying Falk classification as a conscientious objector.

Later the Court of Appeals was faced with the issue of selective enforcement.

The majority opinion begins by saying (on page 620):

> "Certainly, the prospect of government prosecutors being called to the stand by every criminal defendant for cross-examination as to their motives in seeking an indictment is to be avoided."

and furthermore,

> "The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice."

But as to the particular circumstances of Mr. Falk's case compelling factors existed. As the court stated,

> ". . . the combination in this case of the published government policy not to prosecute violators of the card possession regulations, Falk's status as an active and vocal dissenter to United States policy with regard to the draft and the Vietnam War, the Assistant United States Attorney's statement that officials ranging from an Assistant Attorney to the Department of Justice in Washington participated in the decision to prosecute Falk, the untimely delay in bringing the indictment (three years) and the government stated policy to prosecute only those who refuse induction[1] while absolving those who submit to the will of the authorities, lead us to conclude that the District Court erred in refusing a hearing on the offer of proof. The unrebutted evidence before the court, including the admission of the Assistant United States Attorney[2] and

[1] Falk was left little choice in this respect "because his local draft board arbitrarily and without grounds to do so refused his claim as a conscientious objector and he was forced to refuse induction in order to assert a valid claim, thereby also incurring prosecution for prior minor infractions" *U.S. v. Falk*, 479 F.2d 616, 622 (7th Cir. En Banc 1973). (Minor infractions included failing to possess registration and classification cards.)

[2] The Assistant United States Attorney had admitted in effect that the prosecution against Falk was an arbitrary attempt to punish Falk for the exercise of his First Amendment rights. *U.S. v. Falk*, 479 F.2d 616, 621 (7th Cir. En Banc, 1973).

the two published statements by the Selective Service officials which contradict the propriety of the action taken in this case, made out at least a prima facie case of improper discrimination in enforcing the law."

A key point to remember is that *Falk* was a situation where criminal prosecutions were being utilized to put a chilling effect upon the lawful exercise of their First Amendment rights by American citizens. It is an elementary concept that the protection of our First Amendment freedoms is a critical element in the preservation of our democracy. It would seem that much, if not most, of the justification for the decision in *Falk* came from this chilling effect and the desire to stop it immediately. Respondents contend that without the element of First Amendment violations, the narrow majority in *Falk* would have come out differently.

However, just for the sake of argument, let's temporarily disregard the First Amendment overtones in *Falk*. This leaves us with a young man who is arbitrarily and erroneously denied conscientious objector status. This unlawful misclassification then opens the door enabling the government to single Falk out for minor, otherwise ignored violations. Then three years later Falk is prosecuted, but not before the government comes out and says through official policy statements and through statements of the prosecutors, that, yes indeed, they did single Falk out and, yes indeed, they did it arbitrarily and they did it because they wanted to punish him for his opinions about the Vietnam War. In these circumstances, the Court of Appeals in a four to three decision said that a prima facie case had been made out and therefore Falk was entitled to an evidentiary hearing.

As has been previously mentioned, Petitioners cite *Whitus v. Georgia*, 385 U.S. 545 (1967), as being sup-

portive of *Falk*. *Whitus* concerned a case where the Petitioner's trial, in the Georgia courts, resulted in a conviction of murder. The grand and petit juries involved with the first trial had excluded Negroes from serving on the basis of their race. For the second trial, the State employed the same jury selection procedure that had resulted in the discrimination in the first trial. In this situation the Court held that there was a prima facie case of purposeful discrimination in the selection of grand and petit juries for the second trial.

Respondents will agree that this certainly seems like a reasonable decision. Furthermore, we will grant that the words prima facie are used in the Court's holding. Beyond that, however, it is difficult to see much that *Whitus* contributes to selective enforcement in general or to the instant case in particular.

After this survey of selective enforcement and the law, we can return to the present case. It has already been pointed out that Petitioners have not shown any intentional discrimination and they have not shown any arbitrary selectivity based upon an unjustifiable standard such as race or religion. If the Grand Jury did use any selectivity at all, it was only the most logical kind of selectivity, that of simply choosing the most guilty and the most blameworthy for indictment. Therefore, Respondents urge that, without even considering *Falk*, Petitioners have failed to show either impermissible selective enforcement or a prima facie case of selective enforcement. Also, as has been previously noted, the wisdom of the *Falk* decision is open to question. Nevertheless, under the *Falk* guidelines, the Petitioners still don't fare any better. First of all, the instant case lacks the First Amendment overtones that were crucial to the *Falk* decision. Even disregarding this determinative fact, the Petitioners' legal position is little improved.

It must be remembered that the whole D. Don Lowers investigation was a vast and far-reaching endeavor with hundreds of witnesses and law enforcement officials. Yet, Petitioners take one isolated, incomplete statement from an investigator, Mr. Horden, and claim that this constitutes a prima facie case. Several points must be noted here. First of all, even the Petitioners (in Petitioners' Brief, page 15, footnote 3) admit that Mr. Horden at the same time he made the statement upon which they rely, also gave further testimony which explained the statement and which tended to refute Petitioners' whole argument. (See Appendix I.) Secondly, let's examine exactly what Mr. Horden did say. He said that about sixty-five (65) persons were disposing or assisting Mr. Lowers in placing these various securities. That is indeed a correct statement. Sixty-five or more people were to some degree assisting Mr. Lowers in disposing of the securities and Respondents have never denied it. As a matter of fact, that is the main reason that the Grand Jury was called into being—to see just who was involved in the scheme and to determine exactly how deeply involved they were. And it was only after it had spent tens of thousands of man hours investigating, did the Grand Jury, acting solely on its own initiative, come to a conclusion as to whom was criminally liable. Furthermore, as has been already mentioned, the individuals they chose to indict were those who were involved in numerous transactions for profit. In other words, the Grand Jury indicted those who were engaged in the business of disposing of these illegal securities. Since no one but the Grand Jury is allowed to be present at the time they vote on indictments, Respondents can't validly guarantee what the Grand Jury's rationale for the indictments was. However, we can strongly urge that it isn't a constitutional violation for the Grand Jury

to decide to indict those who are clearly most guilty and most blameworthy.

A final thing that has to be noted is some of Petitioners' contentions. Petitioners claim that it is clear that Mr. Horden and the Prosecutor decided which fourteen to select and then told the Grand Jury not to indict any others (Petitioners' Brief, page 9, footnote 1). Not only is this not clear, there is not one shred of evidence to support it. The reason for this failure is very simple, the contention is wholly untrue, just as is the statement (Petitioners' Brief, page 15) that the State had obtained evidence against others against whom the Grand Jury was told not to return indictments. In fact, quite the contrary was true, the Grand Jury told the Prosecution exactly what extra evidence and witnesses they wanted to see and they didn't quit until they had overturned every single stone in the investigation.

We may now ask, what is left of Petitioners' supposed prima facie case? In essence, we are left with one isolated, incomplete statement that doesn't prove anything and with numerous outright fabrications. It would be an understatement to say that this doesn't come anywhere near reaching the *Falk* type situation necessary for a prima facie case. Since Petitioners have never come close to presenting a prima facie case of impermissible selective enforcement as required by *Falk*, they are therefore not entitled to an evidentiary hearing into the matter.

CONCLUSION

Rule 19 of the Rules of the Supreme Court of the United States says that a Writ of Certiorari will be granted only where there are special and important reasons therefor. Respondents urge that such reasons are conspicuously lacking in this case. Petitioners have assumed a state of the law, that doesn't actually exist. Then Petitioners have failed to meet their own guidelines. To paraphrase the holding of the Supreme Court of Ohio, the Writ of Certiorari should be denied for the reason that no substantial constitutional question exists herein.

Respectfully submitted,

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APPENDIX I

Testimony of Thomas E. Horden Taken in the Trial of State of Ohio vs. John M. Steurer

Case No. 72-5-468

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

JOHN M. STEURER,
Defendant.

APPEARANCES:

STEPHAN GABALAC, *Prosecutor Summit County, Ohio*
and
HAROLD STUBBS, *Assistant Prosecutor*
For the State of Ohio
DONALD A. POWELL, *Attorney at Law*
and
CHARLES SCANLON, *Attorney at Law*
For the Defendant

BE IT REMEMBERED, that upon the hearing of the above-entitled case in the Court of Common Pleas of Summit County, Ohio before the Honorable Thomas Stahl, Judge Presiding, and a duly impaneled jury, and commencing September 25, 1972, the following proceedings were had, to-wit:

THOMAS E. HORDEN, being first duly sworn according to law, testified as follows:

DIRECT EXAMINATION BY MR. STUBBS:

Q. Mr. Horden, I am going to stand back here and if you speak up so I can hear you, I am sure everyone in this jury can hear you as well as the Court Reporter. Would you give the Court and jury your full name, please. A. Thomas E. (Edwin) Horden.

Q. Mr. Horden, by whom are you employed, sir? A. State of Ohio, Department of Commerce, Division of Security.

Q. And in that position, what are your duties? A. To investigate alleged violations of the Security Act.

Q. And do you have a specific region or area that you cover? A. State of Ohio.

Q. That is a rather big job. Mr. Horden, how long have you been so employed? A. June 2, 1970.

Q. And have you had occasion to investigate security violations in the Summit County area? A. Yes.

Q. And have you had occasion to investigate security violations by one Don Lowers? A. Yes.

Q. And would you tell the Court and jury generally what that investigation revealed in terms of the investment program of Don Lowers? A. In regard the number of investors or what area?

Q. Be more specific, did your investigation reveal the number of investors involved in this program? A. It is approximately 1100 currently outstanding. Maximum of about 1500 at any one time.

Q. Did this investigation reveal the amount of money involved in the program? A. The outstanding balance in the thing when it went under would have been February of 1972, would have been roughly $11,000,000.

Q. Now, Mr. Horden, directing your attention again to the Lowers' investment program in general and the name John Steurer in particular, did you have occasion to

investigate an individual by the name of John Steurer? A. We did, yes.

Q. And what regard to John Steurer, what did your investigation reveal? A. That he and Ed Barr had sold approximately fifty people.

Mr. Powell: We object to that, Your Honor, that is a conclusion for this jury to make as to whether or not there was a sale. He is not the fact finder. Move to strike that.

The Court: I will sustain the objection the way the question was asked.

Q. What did your investigation reveal in regard to transactions by John Steurer, if any, Mr. Horden? A. That he participated in the disposal of securities.

Mr. Powell: Your Honor, we are going to object to that again, that is part of the definition of sale.

The Court: He added the transactions in that. Did he participate in fifty transactions? Is that what you are saying?

The Witness: Yes, that was our conclusion.

The Court: All right. Now, you can ask what he did without him giving a definition.

Q. By that — transactions — would you be more specific and tell the jury what was done? A. Well, that is a little difficult because the records of Don Lowers were in such condition that once they were regenerated we are not sure this was a complete set of records.

Mr. Powell: We would ask for a voir dire examination of this man before he starts testifying from records that he says are not complete and records that are difficult for him to interpret.

The Court: You want to voir dire? I rather think it is a question for the jury whether they want to believe the witness. Whether he knows what he is talking about

or he doesn't or what. You can develop your way on cross examination.

Q. Okay, Mr. Horden, in regard to promissory notes, what did you determine in regard to John Steurer, if anything? A. He had issued and sold promissory notes.

Mr. Powell: We are going to object to the use of the word sold. That is for the jury to determine, Your Honor.

The Court: Mr. Stubbs, will you have him not use the word sold. If he got money for it, let him say that.

Mr. Powell: Thank you, Your Honor.

Q. Just indicate what the transaction was that you uncovered, Mr. Horden.

Mr. Powell: If any.

Mr. Stubbs: I will ask the questions, Mr. Powell.

Mr. Powell: Ask them right then, Mr. Stubbs.

Mr. Stubbs: I will ask the Court to instruct counsel to afford me the same courtesy that was afforded counsel in his portion of this trial.

The Court: Mr. Powell, I know you are in this. Let Mr. Stubbs conduct his examination just like I will make him let you conduct your examination.

Mr. Powell: I object to the form of that last question then, Your Honor.

Q. Mr. Horden, again what transactions, if any, did you uncover concerning promissory notes? A. In the records of Don Lowers there were notes made payable to John Steurer signed by Don Lowers. In the course of the investigation we did determine that there were notes to other individuals that were signed by John Steurer.

(Thereupon, State's Exhibits 1 and 2 were marked for identification.)

Q. Now, Mr. Horden, handing you what has been marked for purposes of identification as State's Exhibit 1, would you examine that please? A. Yes.

Q. And would you tell the jury what that is? A. This is a certification of the Division certifying that the Division records contain that there is no security dealer license or security salesman license issued for John M. Steurer.

Q. By whom is it signed? A. Dennis Shaul, Acting Commissioner of Securities.

Q. Handing you State's Exhibit 2, would you tell the jury what that is? A. Again, a certification of the Division indicating that there are no securities of any nature have ever been registered with the Division by John M. Steurer.

The Court: Let me see that.

Mr. Stubbs: I have nothing else of this witness, Your Honor.

CROSS EXAMINATION BY MR. POWELL:

Q. Mr. Stubbs asked you about your investigation and he asked you generally what that investigation revealed, and in response to that you indicated that the investigation revealed that there were some 1100 to 1500 investors, is that correct? A. That is correct.

Q. And you also indicated that that investigation revealed that there were perhaps as much as $11,000,000 involved? A. That is correct.

Q. Now, what else did that investigation reveal, sir? A. In what area?

Q. Well, it was a very general question. I would like you to answer it completely. Did that investigation reveal anything else to you? A. Yes.

Q. All right. Tell the ladies and gentlemen of the jury what it revealed. A. Well, it revealed that many of the transactions that were entered into and the various dispositions of securities was entered into, was participated by as many as approximately 65 various people.

Q. All right. When you say 65 various people, what did your investigation reveal that these 65 people were doing? A. Well, they were disposing or assisting Mr. Lowers in placing these various securities.

Q. Other people that were doing the same thing that Jack Steurer is charged with doing? A. That is correct.

Q. There were some 65 of them? A. That is correct.

Q. Did that investigation indicate that any lawyers were doing that?

Mr. Stubbs: Your Honor, I am going to object as to the question not being relevant to the issues before this jury and the Court.

Mr. Powell: Well, I certainly think he has opened the door this time, Your Honor. After all of that yelling we heard about my mentioning the number of investors and what does he do? His second question he asked him the number of investors.

Mr. Stubbs: The number of investors has nothing to do with the category or classification of the investors.

Mr. Powell: There was no objection when he testified there were 65 other people. I want to know something about these other people.

The Court: All right, go on.

Q. Do you remember my question, sir? A. Would you repeat it.

Q. Were there any lawyers within the group of classification?

The Court: I don't think that question — not about what particular class of people.

Mr. Powell: Well, withdraw it then, Your Honor.

Q. Now, you have indicated to the ladies and gentlemen of this jury that there were some 65 people that your investigation revealed did the same thing that Jack Steurer did, is that correct? A. No sir, that wasn't what I said.

Q. That is not what you said? A. I said there were approximately 65 participated in the disposition of the various securities on behalf of Mr. Lowers.

Q. There were 65 people that participated? Tell us about those 65 people, please. A. There were various methods used to assist in the disposition of these securities. Some of them sold their own securities and turned around and invested the money with Mr. Lowers. Some of them really issued or caused Mr. Lowers to issue various securities and the others would take a commission off of the top of anything they would sell. Some people participated in the sale from relatives. Some to close personal friends without any profit. Other people were participating in it for the profit. They were engaging in the business of buying and selling securities . . .

Q. Your investigation revealed, did it not, that D. Don Lowers was the beginning point for this investment program? A. This would be the motivation, that is correct.

Q. When did your investigation reveal that D. Don Lowers started this program? A. Early last 1963 or '64.

Q. And it continued then until the late part of '71 or early '72? A. Early '72.

Q. Now, isn't it correct that the Security Division at one time, through one of its officers, ruled that there was nothing wrong with the D. Don Lowers Program? A. I don't know what you are talking about.

Q. All right.

Mr. Powell: Nothing further.

Q. It is correct, is it not, that your investigation then revealed that D. Don Lowers was not engaged in any business other than the business — the money business — the pyramiding of money? A. Again, as I indicated earlier, the records were not conclusive. All we can say is that there was no specific proof. That that was all the records.

That this was nothing other than a few ledger cards of what had been submitted to the bankruptcy court. There is an indication of memos. There are notes back and forth to Don from various people who assisted him in disposing of these securities indicating that the money was to be spent in this program or to be invested in this program. But if you are asking me, do I know specifically if he engaged in any business other than raising money, I don't know of my own knowledge. At the same time I don't know this is all the records. To my knowledge, there is no business involved.

Q. So your testimony is from the incomplete records that you have examined? A. I don't know that they are incomplete. I am saying at this point we have bushel baskets of records which we assume are all the records. We have no way of knowing.

Q. From these records then, it is your testimony that there was no indication that D. Don Lowers was in any business other than the money business or the pyramiding of money, is that correct? A. There is no specific evidence that he was actually consummating any business. There is evidence, and we did talk to him, that he attempted to put these packages together. He was attempting to do that. Whether or not he consummated these, we have no way of knowing.

Q. No evidence that he ever consummated one single business deal? A. Other than a few real estate transactions, that is correct.

Mr. Powell: Nothing further, Your Honor.

The Court: Any redirect?

Mr. Stubbs: Just one question or two, Your Honor.

REDIRECT EXAMINATION BY MR. STUBBS

Q. Mr. Horden, you have indicated on cross-examination that your investigation showed that some of the 65

were in the business of buying and selling securities, is that correct? A. Yes sir, that is correct.

Q. From your investigation, were you able to determine whether the Defendant John Steurer was in the business of buying and selling securities?

Mr. Powell: Object to that. That is a question for the jury.

Mr. Stubbs: It was opened by the defense counsel, Your Honor.

The Court: You can't go on and ask him how the people did this or that without letting him have the right to ask this.

Mr. Stubbs: Would you please read back the question.

(Thereupon, the previous question was read back by the Court Reporter.)

The Court: He has a right to go into what you asked on cross-examination.

Mr. Powell: I didn't ask if this Defendant . . .

The Court: You asked about other people?

The Witness: Yes, we did.

Q. And what was that determination?

Mr. Powell: Object.

The Court: Overruled.

A. Yes, we did. We did make that determination, yes.

Q. What was the determination? Was he or was he not in the business of buying and selling securities?

Mr. Powell: Object.

The Court: Overruled.

A. Yes, as far as we could determine, he was.

Mr. Stubbs: Nothing further of this witness, Your Honor.

RECROSS EXAMINATION BY MR. POWELL

Q. Were the other 65 people also in the business? A. No, sir.

Q. How many of them were? A. Approximately 13 to 14.

Q. That is all? Your records only show 13 to 14 people? A. Were engaged in the business of selling securities, yes.

Q. Who made that determination? A. The records.

Q. What records? A. The records of Mr. Lowers.

Q. All right, it is correct, is it not, that there is a civil suit filed in the Federal bankruptcy court?

Mr. Stubbs: Your Honor, I am going to object again to matters outside the issues before this Court.

Mr. Powell: The Department of Security is a party to that lawsuit, and it is very important. It is under his jurisdiction, and there are 28 people named in that suit.

Mr. Stubbs: Your Honor, this is recross examination and it should be limited to matters brought out on redirect examination.

The Court: He didn't bring that up.

Mr. Powell: That man said there were only 13 or 14 people.

The Court: He didn't say there were only 13 or 14 people sued.

Mr Powell: In the business of it and his department signed . . .

The Court: Let's not argue this in front of the jury.

Mr. Powell: I would ask to . . .

The Court: I will sustain the objection because you are going beyond what was brought out on redirect examination.

Q. You have a list of the 65 people that you have mentioned? A. Do I have it with me?

Q. Yes. A. Obviously, no.

Q. Can you get a list? A. I am sure it is available.

Q. Would you get it if it is available? A. It is over in the office.

Q. It is where? A. Probably in the Prosecutor's office.

Q. Let's have somebody call and get it.

Mr. Stubbs: I am going to object, Your Honor, what relevance does it have to the ladies and gentlemen of the jury?

The Court: Ladies and gentlemen of the jury, I don't like to have you hear all of these things. You are going to think that is part of the lawsuit pretty quick. So remember my admonitions and go to the jury room.

(Thereupon, the jury retired to the jury room.)

Mr. Powell: Your Honor, as the Court no doubt recalls, in my opening statement I mentioned the number of investors involved and the fact that there were 75 of these people doing the same thing. It was objected to quite strenuously by the Prosecutor and in fact . . .

Mr. Gabalac: That wasn't objected to by me. I didn't object except to find out of these 14 indicted — how many are indicted is not relevant or material to this case.

Mr. Powell: In any event the first or second question that Mr. Stubbs asked, elicited the answer that there were all of these people involved — some 11 to 15 hundred.

That man then, there were no objections, said there were 65 people that were participating in this plan. Helping D. Don Lowers dispose of cognovit notes. He said that there, and there was no objection until three questions later. Now, that certainly opens the door. This man now says that there, in fact, were only 13 or 14 people in this business, yet there has been a civil lawsuit filed in which Dennis Shaul, as this man's supervisor or boss, has entered an appearance and said that 28 people were in the business of doing this. We think it is very, very relevant.

How can he have his cake and eat it too?

The Court: Mr. Stubbs and Mr. Gabalac, let me have a chance to talk. Go on.

Mr. Powell: How can that man say there are only 13 or 14 when the door was opened by the Prosecutor when that is not true?

The Court: Well, what is the difference?

Mr. Powell: The door was opened by the Prosecutor.

The Court: I don't care if the door was opened to the top of the Washington Monument. What has this got to do with this man other than that there was a scheme to sell promissory notes. Because they only brought in 13 or 14 others, that is your constitutional question as to whether they are picking some. What relevance does that have except as it is to show that this man knowingly sold a promissory note?

Mr. Powell: Your Honor, how can the Prosecutor get up and talk about all of these transactions, talk about all of the money that was involved in this situation and then the Court say that that is not fair game or, as you have indicated, other transactions are not going to be in.

He didn't only talk in his opening statement of other transactions of Jack Steurer, he talked about a lot of other transactions — Ed Barr, friends.

The Court: I want him to have his full opportunity to finish his argument.

(The Court made that last statement to Mr. Gabalac who was in the process of attempting to make a statement.)

Mr. Gabalac: I am sorry.

Mr. Powell: You have heard it unless the Court has a specific question.

Mr. Gabalac: Now, he asked him about people helping Lowers dispose of, and he said securities and there were some 65. He then asked him to categorize the 65. He said some were to relatives, some were to people without profit, some were in the business of buying and selling securities. These were the different categories he de-

scribed. Then he asked him specifically how many were in the business, and when he asked him that question, he made a very simple answer — 13 or 14 were in the business. That is his opinion as the result of his investigation, and we laid the foundation of what his activities were.

Now, whether or not there is another action in a civil suit will simply cloud the issues here. We don't know what is required as far as elements are in the civil suit or what the whole basis is. It has nothing to do with the materiality of whether or not this Defendant was licensed as a broker or salesman.

The Court: I didn't think it had anything to do with it when you asked it.

Mr. Powell: Aren't I entitled to impeach this man, Your Honor?

Mr. Gabalac: He hasn't said anything that was contradictory at the present time. He is trying to contradict him by his own statement, by a civil suit we know nothing about.

Mr. Powell: We are going to bring the records in.

Mr. Gabalac: Fine, but you can't do it now.

The Court: I am going to sustain the objection. Bring the jury back in here. Again, Mr. Powell, I know what you are trying to do is to show that Lowers was guilty, and no matter what this man did, he is not guilty anyhow, and I am not going to stop you.

Mr. Powell: Do I understand that the Court is going to allow me to bring in the records from the civil suit?

The Court: I am not giving you rulings in advance.

Mr. Powell: I thought that was what the Court said.

The Court: I did not.

(Thereupon, the jury was returned to the courtroom and seated in the jury box.)

(Thereupon, Mr. Powell proffered the following into the record:)

PROFFER

By Mr. Powell:

Defendant would like to proffer in the record that the trustee in bankruptcy has filed a lawsuit naming 28 people in the Lowers' program, and that the official appearance has been made by the Security Department, Dennis Shaul, head of it, and that the purpose of the questioning which the Court has disallowed is to impeach the credibility of the witness that is currently on the stand.

* * * * *

IN OPEN COURT

The Court: Is that all?

Mr. Powell: That is all, Your Honor.

Mr. Stubbs: Nothing further from the prosecution, Your Honor.

The Court: Next witness.

(Witness excused)